IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-215

UNITED STATES OF AMERICA, *Petitioner*

v.

JOHN R. PARK

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF FOOD CHAINS

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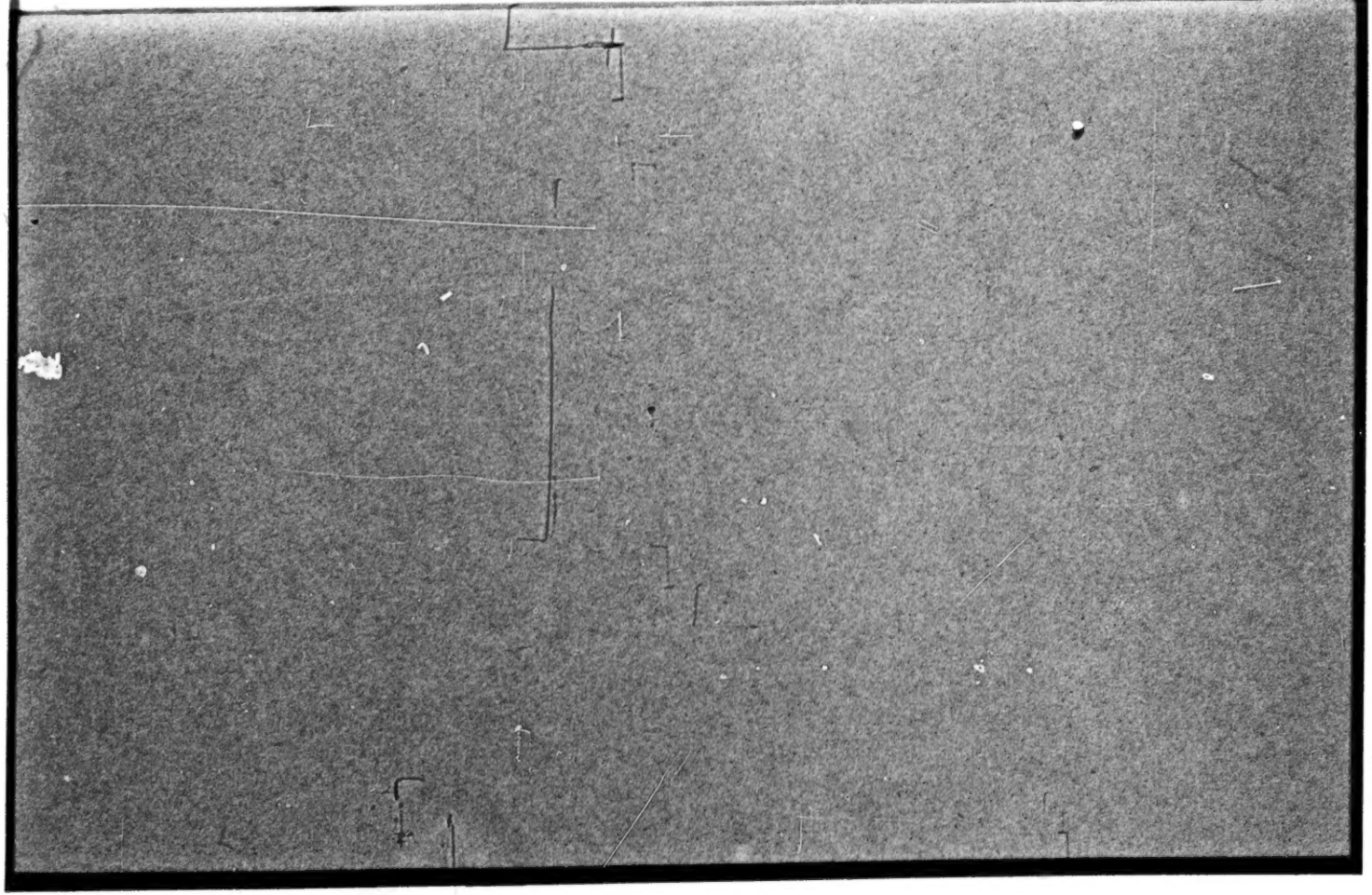

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STATEMENT OF INTEREST

The National Association of Food Chains, Inc. [hereinafter "NAFC"], submits this brief as *amicus curiae* because of the concern of its members with the matter before the Court. Both parties have given their consent to NAFC's participation, pursuant to Rule 42.2.

NAFC is a non-profit trade association whose approximately 200 members are engaged in the retail distribution of food and grocery products. The Association is composed of all the larger, most of the medium-sized and a cross-section of smaller food chains in the United States.

The members of the Association engage in numerous activities subject to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, including warehousing and distributing food products to individual stores. NAFC members are also extensively engaged in food processing activities such as the operation of dairies, bakeries, coffee plants, and canneries.

Members of NAFC have a substantial and continuing interest in the effective enforcement of the Federal Food, Drug and Cosmetic Act. It is to the obvious benefit of all food chains that the food which they purchase from suppliers and sell to customers is free from adulteration, handled under sanitary conditions and accurately labeled.

The case before the Court concerns the responsibility of top-level management for warehouse sanitation. In order to provide guidance to its members in this important area, NAFC has recently taken responsibility for coordinating the efforts of seven trade associations and the Food and Drug Administration of the Department of Health, Education and Welfare in the preparation and publication of Voluntary Industry Sanitation Guidelines for Food Distribution Centers and Warehouses. These guidelines are attached as Appendix A. The Guidelines indicate the continuing efforts which NAFC and its members have undertaken to achieve compliance with § 301(k) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 331(k).

The implications of this case, however, extend beyond the issue of warehouse sanitation and the application of § 301(k), 21 U.S.C. § 331(k). The decision in this case will have a direct impact on the extent of

criminal prosecution for all offenses under the Federal Food, Drug and Cosmetic Act [hereinafter "Act"]. As presented to the Court, the issue is whether or not an individual can be held criminally liable for a corporate violation of the Act where there is no evidence of his participation in the alleged violation.

NAFC does not question whether an individual employee should be subject to criminal sanctions under the Federal Food, Drug and Cosmetic Act, where through some act or omission on his part a food product is unlawfully adulterated or misbranded. Where, however, a corporate officer or other employee has diligently undertaken to establish and implement a comprehensive compliance program neither the statute nor prior cases require that he be convicted of a criminal offense. To the contrary, the underlying purpose of the Act, purity and accurate labeling of food, should encourage such comprehensive compliance. This purpose would be ill-served by a construction of the Act which would subject a company employee to criminal punishment for inadvertent, often unavoidable, violations without regard to the comprehensiveness of the compliance program which he has established or the diligence of his supervisory efforts.

NAFC's interest in this case, thus, derives from a basic conclusion that effective compliance with the Act will best be obtained by requiring a high standard of effort as evidenced, in part, by its warehouse sanitation guidelines. *See,* Appendix A. The Government's advocacy of an absolute criminal liability rule based solely on an individual's corporate position adds nothing to effective compliance and, in fact, may detract from it.

The decision of the United States Court of Appeals for the Fourth Circuit established a correct, practical, and equitable standard which will result in better compliance with the Federal Food, Drug and Cosmetic Act.

The decision of the Court of Appeals provides that an individual's criminal liability under § 303 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 333, must be based on his own acts or omissions which contribute to a violation. NAFC's members strongly urge that this standard be affirmed, both because it correctly interprets applicable law, and because it establishes a workable rule for compliance with the Act.

SUMMARY OF THE CASE

This action was initiated in the United States District Court for the District of Maryland by criminal informations against Acme Markets, Inc. [hereinafter "Acme"] and Acme's President, Respondent John R. Park. The informations were based on the presence of rodents in a portion of Acme's Baltimore warehouse. Acme, a large retail food chain employing approximately 36,000 persons in 874 retail outlets, has twelve main warehouses and four special warehouses.

The informations against Acme and Park contained five counts, four of them based on deficiencies noted during a Food and Drug Administration inspection in November-December 1971, and one based on a deficiency noted in a subsequent inspection in March of 1972. The corporate defendant, Acme, Inc., entered a plea of guilty to each of the five counts.

Prior to trial, Park filed a Motion for Bill of Particulars seeking the details of his alleged liability

for the violations. (Jt. App. at 10) The government responded to the motion by disclosing that the evidence would not show that defendant Park personally performed any of the acts described in the information, but that "the government's evidence will simply show that the defendant was a corporate officer who, under law, bore a relationship to the receipt and storage of food which would subject him to criminal liability under *United States* v. *Dotterweich,* 320 U.S. 277 (1943)." (Jt. App. at 14-15)

At Park's trial, the charge to the jury was given in substantially the form requested by the government and incorporated the same theory of liability set forth in the government's response to the motion for bill of particulars. After defining the elements of interstate shipment and unsanitary conditions, the trial court charged the jury to consider a third element:

> "Thirdly, that John R. Park held a position of authority in the operation of business of Acme Markets, Incorporated.
>
> "However, you need not concern yourself with the first two elements of the case. The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets." (Jt. App. at 61)

This portion of the charge to the jury, combined with other portions reflecting the view that criminal liability might exist without evidence of any wrongful action on the part of the Respondent, resulted in the Court of Appeals reversing. *United States* v. *Park,* 499 F.2d 839 (4th Cir. 1974).

In reversing Park's conviction, the Court of Appeals concluded:

> [A] finding of guilt must be predicated upon some wrongful action by Park. That action may be gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission of omission which would "cause" the contamination of the food. *United States* v. *Park, supra,* 499 F.2d at 842.

The Court of Appeals also concluded:

> It is the defendant's relation to the criminal acts, not merely his relation to the corporation, which the jury must consider; 21 U.S.C. § 331 is concerned with criminal conduct and not proprietary relationships. *United States* v. *Park, Supra,* 499 F.2d at 841.

The government petitioned for a writ of certiorari claiming that individual guilt may be based on "constructive participation," a test to be applied solely on the basis of the individual's formal duties and official responsibilities (Petitioner's Brief for Certiorari at 12).

SUMMARY OF ARGUMENT

I.

The decision of the Court of Appeals correctly interprets the applicability of criminal sanctions under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, and is consistent with the decision of the Court in *United States* v. *Dotterweich, supra.* Justice Frankfurter's decision in *Dotterweich* concludes that the Federal Food, Drug and Cosmetic Act is part of a class of legislation which ". . . dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing," *United States* v. *Dotterweich, supra,* 320 U.S. at 281. A person who violates this type of statute is subject to "strict" liability for

his violative act, whether or not he was aware that his action violated a regulatory standard. The Fourth Circuit correctly followed *Dotterweich* in concluding that while awareness of wrongdoing is not an element of the offense, Park could not be found guilty in the absence of "wrongful action" on his part. *United States* v. *Park*, *supra*, 499 F.2d at 841. *See* text 8-13, *infra*.

II.

Criminal liability for the acts of others must be based on the accused's participation in a criminal act, or his aiding and abetting in its commission. *See*, text 13-16, *infra*.

The government's position erroneously states the law by confusing the element of "awareness of wrongdoing" which need not be proved, with the element of "wrongful action" which must be found to hold Park as President of the company criminally liable. Until the government demonstrates that Park "participated" in causing a violation of the Act, he is not within the class of persons who may be subject to the Act's strict liability. The net effect of the government's position is to advocate that Park be held criminally liable by virtue of his office alone, which is a fundamental misconstruction of the Court's reasoning in *Dotterweich*. The government and the district court have erred in applying strict liability to Park without requiring proof of the casual connection, if any, between Park and the alleged violations. They have, thus, erroneously ignored controlling and traditional requirements of aiding and abetting which must be proved to establish vicarious participation in the wrongful action. *See* text 16-24, *infra*.

III.

The decision of the Court of Appeals would lead to more effective compliance with the Federal Food, Drug and Cosmetic Act than can be achieved through the standard urged by the government. The Court of Appeals has provided an incentive for managers to become responsibly involved in complying with the Federal Food, Drug and Cosmetic Act, and to build affirmative records demonstrating their care and diligence in exercising such responsibility. The government's standard would deter the involvement of corporate officials in compliance programs.

The decision of the Court of Appeals would make diligence a defense, while the standard of constructive participation urged by the government would make mere corporate position a crime. Successful compliance with the Federal Food, Drug and Cosmetic Act requires broad-scale and positive involvement of company managers and employees which would be encouraged by the Court of Appeals' standard. *See* text 17-24, *infra.*

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISION IN *UNITED STATES v. DOTTERWEICH.*

The Court of Appeals properly recognized that:

> . . . For an accused individual to be convicted, it must be proved that he was in some way personally responsible for the act constituting the crime. The Supreme Court recognized this in *Dotterweich:* "The offenses committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws

> . . ." *United States* v. *Park, supra,* 499 F.2d at 841 (4th Cir. 1974).

The Court of Appeals cited further language from *Dotterweich* in support of its decision:

> . . . To use the language of *Dotterweich,* "under Section 301 [21 U.S.C. § 331], a corporation may commit an offense and all persons who *aid and abet* its commission are equally guilty." *Id.* (Emphasis supplied by Court of Appeals.)

The government has relied on *Dotterweich* throughout its prosecution of Park. *Dotterweich* has been cited as authority by the government in its response to Park's motion for bill of particulars, its request for a charge to the jury and its petition for a writ of certiorari and its brief on the merits. The position enunciated by the government and incorporated by the district court in its jury charge is a misinterpretation of *Dotterweich.*

The government erroneously ignores the distinction set forth in *Dotterweich* between the "strict" liability for violations of the Federal Food, Drug and Cosmetic Act and "vicarious" liability of individuals for these violations. Strict liability is applied where awareness by the accused that his action was wrongful is not an element of the crime. Justice Frankfurter characterized the Federal Food, Drug and Cosmetic Act as a statute embodying this type of liability:

> . . . Such legislation dispenses with the conventional requirement for criminal conduct—awareness of wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger. *United States* v. *Dotterweich, supra,* 320 U.S. at 281.

Although the Federal Food, Drug and Cosmetic Act establishes a standard of strict liability for determining whether individuals are criminally liable, this standard was carefully limited by Justice Frankfurter to individuals ". . . standing in a responsible relation to a public danger." *United States* v. *Dotterweich, supra,* 320 U.S. at 281.

While Mr. Justice Frankfurter held that an individual who has no "awareness of wrongdoing" could be convicted of violating the Federal Food, Drug and Cosmetic Act, he carefully defined those who might be subject to this strict liability as persons having the same causal relationship to the violation as described in section 322 of the penal code, 18 U.S.C. § 550 (1943) later codified in 18 U.S.C. § 2. *United States* v. *Dotterweich, supra,* 320 U.S. at 281 (1974).

Standards of liability for aiders and abetters in federal crimes are defined in 18 U.S.C. § 2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In *United States* v. *Dotterweich, supra,* the defendant had a close causal relationship to the violations charged since the defendant had *direct* supervisory responsibility over the *physical* acts which resulted in the violation. Joseph Dotterweich admitted personal involvement with and oversight of all the activities of Buffalo Pharmacal Company, Inc., the corporate de-

fendant.[1] The language of the *Dotterweich* decision which concluded that "awareness of wrongdoing" is not a necessary condition precedent for criminal conviction under the Federal Food, Drug and Cosmetic Act is addressed to the defendant's strict liability for acts in which he participated, not to his vicarious liability for acts in which he did not participate.

Dotterweich cannot be interpreted, as it has been by the government, to extend criminal liability to individual employees, absent any evidence of their personal participation in a violation of the Federal Food, Drug and Cosmetic Act. The Federal Food, Drug and Cosmetic Act imposes strict liability only on those who participate in violating the Act; it does not impose a unique standard of vicarious liability, absent aiding and abetting as defined in 18 U.S.C. § 2.

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[1] The Record which was before this Court in Dotterweich shows that not only was Mr. Dotterweich responsible for every aspect of the corporate defendant's busienss, but also that he testified in a manner which emphasized his personal responsibility. *See*, Appellant's Brief at 12, *United States* v. *Park*, 499 F.2d 839 (4th Cir. 1974) which states in pertinent part:

The violations charged in Dotterweich arose from two shipments of digitalis alleged to be less potent than required by law and a shipment of pills alleged to be misbranded. The evidence showed that the corporate defendant had been "created" by Dotterweich, in the words of defense counsel (R. 63), was owned by him, had approximately 26 employees, working on one floor of an office building, with Dotterweich as President, "General Manager," and the only supervisor. During the testimony by Dotterweich, his counsel almost invariably used the word "you" to refer to actions taken by other employees who worked under Dotterweich's supervision (R. 128, 141, 142). On cross examination, Dotterweich admitted that, "When I am in the place, I am in charge," and that he was "the boss," and that he must have been in charge on a day when one of the challenged shipments went out since he had signed a letter that day in his capacity as "General Manager" (R. 143-144).

The decision of the Court of Appeals in the present case is carefully consistent with *Dotterweich*. It explains that "strict" liability for violations of the Act is not at issue, *United States* v. *Park,* 499 F.2d *supra,* 840, n.2, and addresses the separate question of whether the charge to the jury in the District Court properly stated the law as to Park's liability as president and chief executive officer of Acme. The Court of Appeals found the charge incorrect since it would have allowed the jury to find Park guilty solely on the basis of his ". . . position of authority and responsibility in the business of Acme Markets . . . even though he had not 'personally participated in the situation'." *United States* v. *Park, supra,* 499 F.2d at 840.

The Court of Appeals properly perceived that ". . . the Government has confused the element of 'awareness of wrongdoing' with the element of 'wrongful action'; *Dotterweich* dispenses with the need to prove the first of those elements but not the second." *United States* v. *Park, supra* 499 F.2d at 841. The Court of Appeals further reasoned that, ". . . It is the defendant's relation to the criminal acts, not merely his relation to the corporation, which the jury must consider; 21 U.S.C. § 331 is concerned with criminal conduct and not proprietary relationships." *Id.*

The Court of Appeals correctly reversed Park's conviction since the jury could have based its verdict on Park's corporate position without considering his participation in the violative acts. The Court of Appeals' reversal is in harmony with the Court's decision in *Dotterweich,* which eliminated the need to prove awareness of wrongdoing, but which did not eliminate

the need to prove the accused's causal participation in the wrongdoing.

II. CRIMINAL LIABILITY OF A SUPERVISORY EMPLOYEE FOR VIOLATIONS OF THE ACT MUST BE BASED ON GROSS NEGLIGENCE. INATTENTION IN DISCHARGING CORPORATE DUTIES OR OTHER ACTS OF COMMISSION OR OMISSION WHICH CAUSE THE CONTAMINATION OF FOOD.

The basic issue presented by this case is the legal standard governing criminal liability of supervisory employees for violations of the law committed by subordinates. The government contends that a supervisory employee may be convicted for a violation occurring anywhere within the company on the basis of his position of authority. The Fourth Circuit holds that a supervisor may be found guilty only where he has participated in wrongful action.

The position of the government fails to provide a standard which juries can use in their deliberations.[2] On the other hand, the position of the Fourth Circuit provides a workable and legally sound standard for instructing juries on the possible criminal liability of company officers.

The present case involves the criminal liability of a general supervisor for the acts of subordinates. It is the type of liability which requires a causal connection between the supervisor's act and the alleged violation.[3] If supervisors are to be prosecuted under

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[2] The government's position is based on a fundamental misconception regarding the criminal responsibility of one individual for the acts of another. Such liability is "vicarious" and yet the government asserts that, "While the liability created by the 1938 Act is strict, it is not vicarious." (Brief for the Government at 14.)

[3] The desirability of holding supervisory officials vicariously liable for corporate violations of environmental standards is examined at length in Note, *Criminal Responsibility for Pollution of the En-*

section 301 of the Act, those prosecutions must be subject to the general standards for the imposition of criminal liability. These standards as embodied in the

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vironment, 37 ALBANY L. REV. 61 (1972). That article discusses Dotterweich's imposition of individual criminal liability for violations of the Federal Food, Drug and Cosmetic Act and advocates a similar standard for environmental legislation. The article goes on to describe the existing standard for vicarious liability as follows:

> The general rule is that an official will not be criminally liable for the acts of others within the corporation unless he participates in the act or aids and abets the criminal activity—3 Fletcher Cyc. Corp. § 1348 (1965); *State* v. *Flahe*, 83 S.D. 655, 165 N.W. 2d 55 (1969); *Clifton* v. *State*, 51 Del. 339, 145 A 2d 392 (1958); *State* v. *Pincus*, 41 N.J. Super. 454, 125 A 2d 420 (1956); *Hartson* v. *People*, 125 Colo. 1, 240 P 2d 907 (1952). 37 ALBANY L. REV. 61, 70.

The general rule recommended in this Note is compatible with the standard proposed by the Fourth Circuit. United States v. Park, 499 F.2d 839. (4th Cir. 1974) *See also* Sayre, *Criminal Responsibility for Acts of Another*, 43 HARV. L. REV. 689, 702-704 (1930). Sayre noted the importance of finding "causation" in those areas where criminal liability was based on the acts of another:

> "Vicarious liability is a conception repugnant to every instinct of the criminal jurist. It is not surprising, therefore, that courts today as a general rule . . . make criminal liability exclusively dependent upon causation. Causation may be proved either (1) by authorization, procurement, incitation or moral encouragement, or (2) by knowledge plus acquiescence. Apart from exceptional groups of cases . . . the law may be summarized as follows:
>
> > (1) If the defendant can be shown himself to have counseled, procured, commanded, incited, authorized, or encouraged the commission of the particular act which forms the subject of the prosecution, all courts agree in holding him criminally liable, even though the agent committed the act through a different instrumentality, or at a different time, or in a different place from that ordered or authorized.
> >
> > (2) Where the defendant has neither authorized nor consented to the particular criminal act, even though he has authorized the general business in the course of which

Court's decision in *Dotterweich* and further developed by Court of Appeals require a "responsible relationship" or causal connection between the wrongful act and the individual charged under the Act.

The decision of the Court of Appeals correctly states the law governing the vicarious liability of an individual employee for violations of the Federal Food, Drug and Cosmetic Act:

> . . . For an accused individual to be convicted it must be proved that he was in some way personally responsible for the act constituting the crime. *United States* v. *Park, supra,* 499 F.2d at 841.

The Fourth Circuit further concludes:

> Upon a subsequent trial the jury should be instructed that a finding of guilt must be predicated upon some wrongful action by Park. That action may be gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission or omission which would "cause" the contamination of the food. *United States* v. *Park, supra,* 499 F.2d at 842.

The Court of Appeals correctly declared that, ". . . The question of causation is to be distinguished from that of intent." *United States* v. *Park, supra,* 499 F.2d at 842, n.7.

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the act was committed, the defendant may be civilly, but is not, except as under (3), criminally, liable.

(3) On the other hand, even if the particular criminal act has not been authorized or consented to, if it grows out of and is the proximate consequence of one that has been authorized or procured, the defendant is criminally liable, whether or not the agent is acting in the course of the defendant's business." Sayre, *Criminal Responsibility for Acts of Another,* 43 HARV. L. REV. 689, 702-704 (1930).

In holding that a supervisor's wrongful action must be causally related to a violation of the Federal Food, Drug and Cosmetic Act, before an individual may be held criminally responsible, the Fourth Circuit has enunciated a legally sound standard to be applied to cases involving "vicarious" liability. In the present case there is no allegation that Mr. Park counseled, procured, commanded, incited, authorized or encouraged the commission of the particular acts which forms the subject of the prosecution.[4] If Park is to be held vicariously liable, then it must be because his conduct falls within the category of vicarious criminal liability where:

> ". . . [E]ven if the particular criminal act has not been authorized or consented to, if it grows out of and is the proximate consequence of one that has been authorized or procured, the defendant is criminally liable . . ."[5]

The Fourth Circuit concludes that "gross negligence and inattention" are the kind of wrongful action upon which vicarious liability may be predicated; thus, finding supervisory employees responsible only for the "proximate consequences" of their actions. *United States* v. *Park, supra,* 499 F.2d at 842.

The standard of liability urged by the government is based solely upon the supervisory position of the defendant.[6] However, while the government suggests that this is not the standard it is advocating,[7]

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[4] *See* Sayre, Note 3, *supra,* at 702.

[5] *See* Sayre, Note 3, *supra,* at 703-704.

[6] This standard based on corporate office-holding comes very close to the type of "status" offense held unconstitutional in California v. Robinson, 370 U.S. 660, rehearing denied 371 U.S. 905 (1962).

[7] "The majority of the Court of Appeals believed the government to be arguing 'that the conviction may be predicated solely upon a

the only additional element which the government apparently views as a prerequisite for a conviction is the existence of a violation on the part of the corporate employer. The government apparently concedes that an accused may demonstrate his lack of power and responsibility as defense to alleged liability.[8]

The proper standard for determining the liability of a supervisor must turn on his causal connection to a wrongful act as enunciated by the Fourth Circuit. The *per se* standard of guilt by position urged by the government is contrary to law. The standard of criminal liability adopted by the Fourth Circuit, is correct and should be affirmed.

III. THE DECISION OF THE FOURTH CIRCUIT WILL RESULT IN MORE EFFECTIVE COMPLIANCE WITH THE ACT BY ENCOURAGING GREATER NUMBERS OF INDIVIDUALS TO BECOME INVOLVED IN SANITATION ACTIVITIES.

The standard for imposition of criminal liability established by the Court of Appeals will result in more effective compliance with the Federal Food, Drug and

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showing that the defendant, Park, was the President of the offending corporation'." (Brief for Government at 11.)

[8] Brief for Government at 14. *See,* United States v. Wiesenfield Warehouse Co., 376 U.S. 86, 91 (1964). *See also,* Morisette v. United States, 342 U.S. 246 (1952), wherein Mr. Justice Jackson noted the limited applicability of strict liability to public welfare offenses. Mr. Justice Jackson raises the implication that strict liability is only appropriate where the accused has failed in a duty which he could reasonably be expected to perform.

> . . . The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. 342 U.S. at 256.

Cosmetic Act than will the standard urged by the government. Successful compliance with the Federal Food, Drug and Cosmetic Act requires the extensive and positive involvement of many individual employees. The standard announced by the Court of Appeals is more likely to encourage such involvement than the standard urged by the government, since it provides an incentive for individual employees to establish an affirmative record showing due care and diligence in complying with the requirements of the Act. The decision of the Court of Appeals will make diligence a defense, while the standard of liability by office urged by the government will make the mere holding of corporate office a crime.

The net effect of the Court of Appeals decision is to encourage individual employees and supervisors to become involved with programs of compliance under the Federal Food, Drug and Cosmetic Act. This extensive involvement is particularly important in complying with the Act's sanitation requirements since optimal compliance entails complex activities which, in most companies, cannot be handled by a single employee or even by a small group of employees. The complexity of a good sanitation program is indicated by the Voluntary Industry Sanitation Guidelines for Food Distribution Centers and Warehouses.[9] The appendix to the Guidelines describes the commitment of personnel necessary for an effective sanitation program:

> To ensure product wholesomeness and proper sanitation, the food warehouse sanitation program must have the commitment of top management, must be implemented by operating supervision,

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[9] Reprinted *infra* as Appendix A.

and must be supported by the entire food warehouse staff. Preventive sanitation—the performance of inspection, sanitation, building maintenance, and pest control functions designed to prevent insanitation in preference to correcting it—should be an important goal of food warehouse management and of food warehouse operations.

A program to ensure continued success in safeguarding the wholesomeness of food and in providing good sanitation will ordinarily include:

(1) An organizational chart showing chain of authority and responsibility.

(2) A flow diagram of receiving, storage, and shipping operations.

(3) Regular maintenance schedules.

(4) Regular sanitation programs.

(5) Regular pest control programs.

(6) An effective program of follow-up and control including reports to responsible executive officer(s)." Appendix A, *infra,* at 15a-16a.

An effective sanitation program must utilize the most modern techniques of management through quality control to systematically achieve product standards and eliminate defects. Management through quality control utilizes methodical inspection at various points in the manufacturing or distribution process to prevent defects and achieve higher quality standards than are obtainable by direct visual product inspection.[10]

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[10] The genesis of quality control is described in J. HAGAN, A MANAGEMENT ROLE FOR QUALITY CONTROL, 62 (1968)

"Quality control originated in inspection. So many defects were originally found in delivered products that inspection was established to screen good products from bad at the end

Preventive techniques, utilizing up-to-date methods of systematic quality control, are the best way to assure compliance with federal sanitation standards. The Voluntary Industry Sanitation Guidelines stress that "preventive sanitation" is preferable to the correction of insanitation and recommend regular maintenance schedules, sanitation programs and pest control programs, together with effective follow-up and reports to responsible executives. The management of this type of recommended sanitation program involves the coordination of a number of people. No one individual can personally sweep every floor or bait every rodent trap. The Court of Appeals by holding each individual liable for his own performance encourages individuals to become involved in compliance programs knowing that their individual responsibility for preventive activities must be diligently pursued.

The tasks of a manager have been defined by Peter Drucker, a leading authority on management techniques, to include: (1) setting objectives; (2) organizing to achieve those objectives; (3) motivating and communicating with employees; and (4) measuring the degree to which objectives are achieved and communicating those measurements to both subordinates and superiors.[11] All of these tasks are involved in the

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of the production line, thus enabling the company to maintain an acceptable performance image and so continue to grow productively. Before long, when it became obvious that the rejected products represented an ever-increasing cost, inspection was extended to include points within the manufacturing process. This move was intended to prevent the manufacture of defective articles and was the start of quality control."

[11] P. DRUCKER, MANAGEMENT, 400 (1974).

management of a sanitation program. The objectives of meeting or exceeding federal sanitation standards are obvious. The organization necessary to achieve the objectives may take many forms. In every case, the success of that organization will depend upon the following integral factors: first, management's communication of program objectives to employees; second, employees' communication of barriers preventing the achievement of program objectives to management; third, on-going measurement of compliance progress.

Improved sanitation can only result from orderly and systematic management utilizing the latest quality-control techniques. The government, in describing courses of action open to Mr. Park, advocates procedures which are disorganized and unsystematic.[12]

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[12] "There were a number of constructive actions [Mr. Park] should have taken. With the list of observations before him, he could have applied his own common sense to the situation and personally ordered corrective action. He could have, for instance, demanded that the warehouse be completely emptied and cleaned, that each lot of food be moved and checked thoroughly for rodents, and that the structure be thoroughly checked to make sure that all possible points of rodent entry be closed. Such measures are elementary methods of house cleaning.

"At the very best, respondent should have personally discussed with McCahan the list of observations item by item and ascertained precisely what McCahan would do about each. He could have demanded to know why the Baltimore facility had been allowed to deteriorate to the point that it had. He could have attempted to ascertain the amount of effort and money that would be necessary to insure that the premises would be cleaned up properly and offered McCahan whatever assistance was necessary. Any one or all of these things would have impressed upon McCahan the importance which he attached to the situation. He could also have instructed the appropriate corporate officials to utilize the resources necessary to remedy the situation. Certainly respondent could have followed up by calling McCahan and other corporate officials who handled sanitation problems to get personal briefings on the specific correc-

Even if a company employee took all of the uncoordinated measures suggested by the government, he would still be subject to criminal prosecution solely on the basis of his corporate position if any violative condition remained.

The decision of the Court of Appeals will have a salutary effect. Under that decision, an individual's failure to organize, communicate, or measure the success of sanitation efforts may constitute evidence sufficient to sustain a criminal conviction, while active efforts to improve sanitation will only create individual liability where such efforts causally contribute to violations of the Act.

Under the standard of liability by office urged by the government, an individual employee who takes part in communication and measurement of compliance is subject to criminal prosecution if any part of the compliance system fails, even where the failure occurs through no fault of the accused. This approach would deter individual employees from involving themselves in the communication and measurement process, which is necessary to achieve optimal sanitation standards. Orderly management requires the

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tions being made. Indeed, given the fact that these same employees had already failed twice in the recent past, respondent could have retained a reputable outside consultant familiar with FDA requirements. Nor would it have been unreasonable for respondent to have personally visited the Baltimore warehouse to see for himself what progress, if any, was being made in correcting the situation. Finally, he could have closed the warehouse down unless and until he was personally satisfied that it had, beyond any doubt, been cleaned up. Given respondent's apathetic behavior, it is not surprising that the necessary steps were not taken and that many of the conditions went uncorrected until a criminal prosecution was instituted." (Brief for Government at 34, n.19)

active involvement of large numbers of employees. Active involvements is the government's own professed goal for the management of sanitation programs. Yet the standard of liability urged by the government would discourage involvement.

The Court of Appeals has correctly decided that the government's standard is not in accordance with settled doctrines of law. The government's standard is inherently unjust because it fails to distinguish between the criminal liability of an employee who exercises due care and diligence in carrying out his responsibilities and one who does not. The sole determinant of *per se* liability under the government's standard is whether any evidence of violation is discovered within an accused's formal scope of authority. No consideration is given to whether the accused had a role in causing that violation. Such an approach would provide an incentive to place responsibility for complying with the Federal Food, Drug and Cosmetic Act on the fewest possible employees rather than making such compliance an extensive, cooperative effort by many employees.

Although the government's policy of liability by office for Food and Drug Act violations can only be justified as a deterrent, there is no demonstration that this standard has been successful in the past.[13]

The Court of Appeals' decision, by requiring that the government prove that an individual act, or gross negligence, or inattention is causally related to the

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[13] *See e.g.*, Comptroller General of the United States, *Dimensions of Insanitary Conditions in the Food Manufacturing Industry*, Report to Congress, No. B-164031(2) (Apr. 18, 1972).

violation, will encourage the greater involvement required for effective sanitation management. This potential for improved compliance is in furtherance of the Act's objectives and compels affirmation of the Court of Appeals' decision.

CONCLUSION

Therefore, the decision of the United States of Appeal for the Fourth Circuit should be affirmed.

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